In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1453

JOHN WESLEY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 456 F. 2d 983. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1972, and a petition for rehearing was denied on April 6, 1972. The petition for a writ of

certiorari was filed on May 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

QUESTIONS PRESENTED

1. Whether a decision by a local board must be set aside where one of several reasons for its conclusion that a claimant for conscientious objector status was insincere, was not legitimate.

2. Whether the conclusion that petitioner was insincere had a basis in fact.

STATEMENT

After a non-jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of willfully refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to the custody of the Attorney General for an indeterminate period in accordance with 18 U.S.C. 5010(b). The court of appeals affirmed (Pet. App. A).

Petitioner registered with his local board on May 19, 1967, and was initially classified I-A (SSF 10).[1] Upon entering college, he was classified II-S (student deferment), and he remained in that classification until he was placed on scholastic probation and failed to register for the spring 1970 semester (SSF 10, 91-92). On March 18, 1970, he was again classified I-A (SSF 10).

On May 6, 1970, petitioner reported for a physical examination and was found fully acceptable for mil-

[1] "SSF" refers to petitioner's selective service file.

itary service (SSF 10). Shortly thereafter, he sought unsuccessfully to enlist in the Navy (SSF 24). On July 8, 1970, his local board ordered him to report for induction on July 20, 1970 (SSF 80). On that date, petitioner indicated that he would refuse induction because he was opposed to war. On August 4, 1970, he formally notified the local board that he was a conscientious objector (SSF 77). The following day he completed and returned an SSS Form 150 (Special Form For Conscientious Objectors), in which he stated that he had first acquired doubts about war while in high school; that he was opposed to all wars; that he was attending meetings of the Baha'i faith; and that although his beliefs were not based on religious convictions, he held them as strongly as if they were so (SSF 71-74).

The State Director of Selective Service ordered the local board to reopen petitioner's classification and to cancel the outstanding induction order (SSF 65). The local board interviewed petitioner on August 20, 1970, to develop further facts regarding his conscientious objector claim (SSF 70). The board delayed its decision pending receipt of information from his references (SSF 62). The board also contacted petitioner's father, who replied that his son had never been religious and as far as he knew was not a conscientious objector (SSF 50).

The board denied petitioner's claim as a conscientious objector on September 17, 1970, on the ground that petitioner was not sincere (SSF 10, 49). The board received an additional letter on September 21,

1970 (SSF 46), but decided finally on October 15, 1970, not to reopen petitioner's classification and gave the following reasons: (1) the lateness of the claim; (2) petitioner's attempt to enlist in the Navy; (3) his recent association with the Baha'i community; and (4) the letter from petitioner's father (SSF 42).

Petitioner appealed the I-A classification (SSF 43) and his file was forwarded to the appeal board on October 20, 1970 (SSF 39-40). On November 13, 1970, the appeal board voted unanimously to affirm the I-A classification (SSF 9). The local board thereafter ordered petitioner to report for induction on January 13, 1971. He refused to submit to induction on that date and his indictment, trial and conviction followed.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that one of the reasons supporting the legal ground on which the local board rested its decision was invalid, and that therefore, under the rationale of *Sicurella* v. *United States*, 348 U.S. 385, and *Clay* v. *United States*, 403 U.S. 698, that decision must be set aside and his conviction reversed.

As the court below pointed out, however, *Clay* and *Sicurella* are not controlling here. Those cases involved the situation where the board "made no statement of the reasons for its action," while here "the local board stated its reasons" and hence it is possible to "determine exactly which grounds it relied upon" (Pet. App. A, pp. 10a-11a).

The decisions of the Court of Appeals for the Eighth Circuit cited by petitioner (*Caverly* v. *United States*, 429 F. 2d 92, and *United States* v. *Iverson*, 455 F. 2d 79) similarly are different from the present case. In those cases the local board stated several legal grounds for its decision, in addition to the reasons supporting each legal ground. The court found that some of the legal grounds given were not supportable, and concluded that since it could not be determined on which legal ground the denial was based, it could not affirm the denial of conscientious objector status although supported by other, proper grounds. By contrast, in the present case the court below concluded only that one of the reasons given by the board as supporting the sole legal ground for its decision (insincerity) had no probative value—the board's reference to petitioner's association with the Baha'i community. The court below correctly held that here "[s]peculation [concerning the legal basis of the board's decision] is unnecessary" (Pet. App. A, p. 11a), and that accordingly the board's invalid reason could be disregarded.

2. Contrary to petitioner's contention, there was a basis in fact for the board's denial of his conscientious objection claim for insincerity. The court of appeals, after setting aside the reason which it found impermissible, held that "the others [reasons] are sufficient to provide a basis for the [board's] conclusion" (Pet. App. A, p. 11a). The full discussion of this matter by the court of appeals (see *id.* at pp. 4a-11a) shows that there were facts which were inconsistent

with his alleged beliefs. The court below properly held that "the circumstances surrounding [petitioner's] late claim, in light of the other facts the board knew when it rendered its decision, formed a basis in fact for its denial" of petitioner's claim (Pet. App. A, pp. 8a-9a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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